UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND WEBCASTING DIGITAL PERFORMANCE OF SOUND RECORDINGS (Web-IV)**	**Docket No. 14-CRB-0001-WR (2016-2020)**

INITIAL BRIEF OF UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, AND SONY MUSIC ENTERTAINMENT IN RESPONSE TO SEPTEMBER 11, 2015 ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW

UMG Recordings, Inc., Capitol Records, LLC (collectively, "UMG"), and Sony Music Entertainment ("SME") respectfully submit this Initial Brief in response to the Copyright Royalty Judges' September 11, 2015 Order Referring Novel Material Question of Law and Setting Briefing Schedule ("Order"). UMG and SME own and license the copyrights in a majority of the sound recordings produced and sold in the United States. UMG and SME are participants in this proceeding through the joint petition filed on their and others' behalf by SoundExchange, whose board of directors includes representatives from both UMG and SME.[1] Under 17 U.S.C. § 802(f)(1)(B), participants in the proceeding may comment on requests for interpretation of novel material questions of substantive law that the Judges refer to the Register of Copyrights.

[1] *See* 37 C.F.R. § 351.1(b)(1)(ii) ("Petitioners with similar interests [in a rate proceeding] may, in lieu of filing individual petitions, file a single petition."); Petition to Participate filed by SoundExchange, Inc. (Jan. 31, 2014) (filed "on behalf of sound recording copyright owners and artists," including "the major record companies").

Here, the Judges have referred the following question to the Register:

> Does Section 114 of the Act (or any other applicable provision of the Act) prohibit the Judges from setting rates and terms that distinguish among different types or categories of licensors, assuming a factual basis in the evidentiary record before the Judges demonstrates such a distinction in the marketplace?[2]

The simple answer is "No." Nothing in Section 114 or any other applicable provision of the Act expressly or impliedly prohibits the Judges from setting rates and terms that distinguish among different types of licensors (assuming a factual basis to do so). To the contrary, and as explained more fully below, the plain language of Section 114 *supports* such a distinction. Distinguishing among types or categories of licensors is entirely consistent with the statutory mandate to set "rates and terms"—plural—that reflect those that a willing buyer and a willing seller would agree to for each seller's product in a market that the Judges have previously recognized is characterized by a variety of rates and terms. Setting multiple rates is also consistent with the statutory provision allowing the Judges to "consider the rates and terms for comparable types of digital audio transmission services and *comparable circumstances* under voluntary license agreements."[3] Where voluntary license agreements are entered into under circumstances that are comparable to those of some licensors but not others, a "one size fits all" approach would defeat the statutory requirement to consider comparability, and could incentivize market participants to enter into unrepresentative voluntary agreements for the purpose of offering them as benchmarks for other, differently situated counterparties.[4]

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[2] Order at 1.

[3] 17 U.S.C. § 114(f)(2)(B) (emphasis added).

[4] *See generally* Mem. Op., *In the Matter of Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings*, 80 Fed. Reg. 58301 (Sept. 18, 2015) (discussing admissibility of certain directly-negotiated license agreements).

ARGUMENT

Neither Section 114 Nor Any Other Applicable Provision of the Act Prohibits the Judges <u>From Setting Rates and Terms That Distinguish Among Types or Categories of Licensors.</u>

The Copyright Royalty Judges have broad discretion to effectuate their mandate under Section 114 to establish rates that most clearly represent the rates negotiated by a willing buyer and a willing seller in the marketplace.[5] The Judges may establish and tailor rates in any reasonable way that is not prohibited by the statute.[6] Here, there is simply no language in either Section 114, or in any other applicable provision of the Act, that "prohibit[s] the Judges from setting rates and terms that distinguish among different types or categories of licensors, assuming

[5] The District of Columbia Circuit Court of Appeals has acknowledged this broad discretion. *E.g., Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 127 (D.C. Cir. 2015) ("Review of administratively determined rates is particularly deferential because of their highly technical nature."); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 759 (D.C. Cir. 2009) ("The standard of review applicable in ratemaking cases is highly deferential."); *id.* at 757 ("The Judges, not this court, bear the initial responsibility for interpreting the statute. Applying the lessons of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we can only assess the reasonableness of the Judges' interpretation of the inherent ambiguity in the statute's mandate."); *cf. Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1007 (2014) ("We are especially deferential to the Judges of the Copyright Royalty Board . . . .") (reviewing rate determination under Section 114(f)(1)); *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1225 (2009) (stating that decisions of the Copyright Royalty Judges are entitled to "increase[d]" deference "because the four objectives it must pursue point in different directions" and concluding that "the agency has not exercised its broad discretion in an arbitrary or capricious manner") (reviewing rate determination under Section 114(f)(1)).

[6] *See, e.g., Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 127 (D.C. Cir. 2015) (permitting the Judges to consider certain evidence even though "the statute does not specifically provide for the consideration" of such evidence and holding that "there is no basis for concluding that a proceeding that *exceeds* the statutory requirements is improper"); *Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule and order)*, 76 Fed. Reg. 13026, 13033 (Mar. 9, 2011) [hereinafter "*Webcaster III*"] (observing that where nothing in the applicable statute "constrains" the Judges from considering a particular type of private agreement, they are entitled to do so).

a factual basis in the evidentiary record before the Judges demonstrates such a distinction in the marketplace[.]"[7]

Not only are Section 114 and other applicable provisions of the Act devoid of language expressly prohibiting the Judges from setting rates and terms that distinguish among different types of licensors, but such a prohibition also cannot be reasonably implied. To the contrary, the plain language of Section 114 contemplates a distinction between the different types and categories of licensors. At least five separate features of Section 114(f) reflect the principle that the Judges should set rates that take account of the real-world, meaningful variation among sellers that enables those sellers to command varying rates for their products: (i) the willing buyer/willing seller standard; (ii) the provision for setting multiple "rates and terms"; (iii) the requirement to consider a service's substitutional or promotional effect with respect to the copyright owner's sound recordings; (iv) the requirement to take account of the relative roles of the copyright owner and the transmitting entity; and (v) the provision for considering voluntary agreements, but only when entered into under "comparable circumstances."

1. Willing Buyer/Willing Seller Standard. Section 114 provides that when "establishing rates and terms for transmissions by eligible . . . services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[8] This mandate necessarily contemplates a range of negotiated rates. As the Judges have observed in prior webcasting rate proceedings, the willing buyer/willing seller statutory standard is one in which "the buyers and sellers operate in a free market unconstrained by government regulation

[7] Order at 1.

[8] 17 U.S.C. § 114(f)(2)(B).

or interference."[9] "Rather than a single seller, the sellers in the hypothetical market [the Judges] are to consider consist of multiple record companies."[10] And, as the Judges have noted, in this marketplace there are "significant variations among *both* buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors,"[11] producing an assortment of agreed-upon rates and terms. Similarly, the Judges have recognized that each seller in this marketplace is selling a product unique to that seller—"a blanket license for *each* record company which allows use of *that* record company's complete repertoire of sound recordings."[12]

In light of this differentiation in the marketplace among both buyers and sellers, as well as the sellers' respective products, the Copyright Arbitration Royalty Panel ("CARP") recognized in the very first webcasting proceeding that "one would . . . expect negotiations between diverse buyers and sellers to generate not a uniform rate, *but a range of negotiated rates* reflecting the particular circumstances of each negotiation. Congress surely understood this

[9] *Webcaster III*, 76 Fed. Reg. 13026, 13028. *See also Digital Performance Right in Sound Records and Ephemeral Recordings (Final rule and order)*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) [hereinafter "*Webcaster II*"] (observing that the hypothetical marketplace "is one in which no statutory license exists").

[10] *Webcaster III*, 76 Fed. Reg. 13026, 13033. *See also id. at* 13029 n. 8 (noting that the court has "clearly rejected" the contention that the "supply side of the market may be largely ignored"); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 128 (D.C. Cir. 2015) ("[T]he Board must set a fee that both a willing buyer *and* a willing seller would negotiate, not just one that is acceptable to the buyer (the webcaster).").

[11] *Webcaster III*, 76 Fed. Reg. 13026, 13029 (emphasis in original); *see also Webcaster II*, 72 Fed. Reg. 24084, 24087; *In the Matter of Rate Setting for the Digital Performance of Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Panel to the Librarian of Congress*, Docket No. 2000–9 CARP DTRA 1&2 at 24 (Feb. 21, 2002) [hereinafter "*Webcaster I CARP Report*"].

[12] *Webcaster II*, 72 Fed. Reg. 24084, 24087 ("*Webcaster I* made clear that 'the willing buyers are the services which may operate under the webcasting license . . . , the willing sellers are record companies and the product consists of a blanket license for *each* record company which allows use of *that* record company's complete repertoire of sound recordings.") (emphasis added).

when formulating the willing buyer/willing seller standard."[13] In short, the willing buyer/willing seller standard necessarily contemplates the possibility of setting different rates for different kinds of licensors, because it directs the Judges to set rates and terms that reflect those that would be found in a hypothetical marketplace characterized by precisely such differentiation.

2. "Rates and Terms." The potential for setting different rates for different kinds of licensors is also reflected in the statute's directive that the Judges set "rates and terms," plural. This multiplicity of rates and terms is consistent with the hypothetical marketplace in which one would expect "a range of negotiated rates,"[14] and references to these plural "rates and terms" permeate Section 114, particularly in Subsection (f). For example, Section 114(f)(2)(A) states, "Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for public performances of sound recordings . . . ." Similarly, "The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall . . . be binding on all copyright owners of sound recordings . . . ."[15]

The use of the plural does not merely reflect the statutory requirement to differentiate among types of eligible transmission services.[16] Instead, the statute uses this plural formulation even where rates are to be set for a *single* service. Section 114(f)(2)(C) deals with the establishment of any new transmission service and describes proceedings "for the purpose of

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[13] *Webcaster I CARP Report* at 24-25 (emphasis added). To be sure, the CARP ultimately decided—without explanation—to set a single rate rather than multiple rates based upon variation among licensors. *Id.* This determination was discretionary, however; neither the CARP nor the Librarian in *Webcaster I* concluded that the statute *required* them to establish a single rate for all licensors, which it clearly does not.

[14] *Webcaster I CARP Report* at 24.

[15] 17 U.S.C. § 114(f)(2)(B).

[16] *See* 17 U.S.C. § 114(f)(2)(A) ("Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation . . . .").

determining reasonable *terms and rates* of royalty payments with respect to such new type of service." This provision expressly provides for the Judges to set multiple rates even with respect to a statutory license for a single "new subscription service." The statutory language thus anticipates that the Judges may set multiple rates for reasons other than distinguishing between types of transmission services—for instance, to distinguish between various types of licensors.

3. Substitution versus Promotion. Differentiation among types of licensors is also contemplated by the non-exclusive, specific factors that the statute directs the Judges to consider under the willing buyer/willing seller standard. One of those factors is "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings."[17]

Because sellers vary "in terms of sophistication, economic resources, business exigencies, and myriad other factors"[18] —and because each record company is selling "a blanket license . . . which allows use of *that* record company's complete repertoire of sound recordings"[19]—the extent to which a service may be promotional or substitutional may vary from one copyright owner to the next. Some record companies may expect statutory webcasting to have a promotional effect, while others may view statutory webcasting as a threat to higher-revenue-per-user exploitations, including interactive streaming and downloads. Setting different rates for different types or categories of licensors would allow the Judges to account for that variation, consistent with the statute's directive to consider whether the service will interfere

[17] 17 U.S.C. § 114(f)(2)(B)(i).

[18] *Webcaster III*, 76 Fed. Reg. 13026, 13029.

[19] *Webcaster II,* 72 Fed. Reg. 24084, 24087 (emphasis added).

with or enhance "the sound recording copyright owner's other streams of revenue from its sound recordings."[20]

4. "Relative Roles of the Copyright Owner and the Transmitting Entity." In setting rates and terms reflective of those that would have been negotiated between a willing buyer and a willing seller in a free market, the Judges must also consider "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk."[21] Proper application of this factor must take account of the significant variation in the resources record labels invest in identifying, developing, and promoting their roster of artists, as well as variation in distribution infrastructure and technological capabilities. These investments, in turn, may result in differences in the product being licensed—and as the Judges recognized in *Webcaster II*, the rates and terms they set should be "directly tied to the nature of the right being licensed"[22] rather than serving only as a "proxy" for "what is truly being licensed."[23]

5. "Comparable Circumstances." Finally, the Judges are also permitted to "consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements . . . ."[24] These agreements can be expected to vary by type of webcaster, the particular licensor, the quality of the product being licensed, and the like. As the statute makes explicit, it is not only the category of webcaster, but

[20] 17 U.S.C. § 114(f)(2)(B)(i).

[21] 17 U.S.C. § 114(f)(2)(B)(ii).

[22] *Id.*

[23] *See Webcaster II*, 72 Fed. Reg. 24084, 24089 (refusing on this basis to adopt a percentage-of-revenue fee structure rather than a per-performance structure).

[24] 17 U.S.C. § 114(f)(2)(B).

also these other circumstances that affect the rates and terms in a negotiated agreement. The Judges are thus directed to consider the rates and terms of such voluntary agreements only when they are for "comparable circumstances." Because the circumstances of a given agreement may be comparable to those of some copyright owners but not others, this key limitation necessarily contemplates the possibility of differing rates for "different types or categories of licensors."[25] Absent such differentiation, market participants could attempt to exploit the diversity in the marketplace by strategically negotiating favorable rates with selected counterparties, and then offering those rates as a benchmark for other market participants despite differences in circumstances. Setting multiple rates for different types of licensors is consistent with, and furthers, the statutory mandate to consider the terms of voluntary agreements only with respect to comparably-situated parties.

CONCLUSION

For the foregoing reasons, neither Section 114 of the Act, nor any other applicable provision of the Act, prohibits the Judges from setting rates and terms that distinguish among different types or categories of licensors, assuming a factual basis in the evidentiary record before the Judges demonstrates such a distinction in the marketplace. Rather, the language of Section 114, and Subsection 114(f) in particular—including (i) the willing buyer/willing seller standard; (ii) the provision for setting multiple "rates and terms"; (iii) the requirement to consider a service's substitutional or promotional effect with respect to the copyright owner's sound recordings; (iv) the requirement to take account of the relative roles of the copyright owner and the transmitting entity; and (v) the provision for considering voluntary agreements, but only

[25] Order at 1.

when entered into under "comparable circumstances"—affirmatively supports the Judges' ability to set rates and terms that distinguish among types of sellers.

October 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2015, I caused a copy of the foregoing – **INITIAL BRIEF OF UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, AND SONY MUSIC ENTERTAINMENT IN RESPONSE TO SEPTEMBER 11, 2015 ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW** to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

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